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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

KRAFT FOODS COMPANY OF WISCONSIN, *et al.*,
Petitioners,

v.

COMMODITY CREDIT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Kraft Foods Company of Wisconsin, The Borden Company, The Cudahy Packing Company, Armour and Company, The Berst Corporation, Safeway Stores, Incorporated, H. J. Heinz Company, and L. D. Schreiber & Co., Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on April 29, 1959.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin is reported at 164 F. Supp.

168, and appears at App. 985.[1] The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 266 F.2d 254, and appears at Appendix B, *infra*, p. 28.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1959 (Appendix B, *infra*, p. 46). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Seventh Circuit err in attributing unwarranted significance to the denial by the Supreme Court of a petition for a writ of certiorari to review a decision of the Court of Appeals for the Fourth Circuit in *Swift & Co. v. United States*, 358 U.S. 837, No. 270, October Term, 1958, which involved transactions similar to those in the case at bar?

2. In deciding that the transactions between Commodity Credit Corporation (CCC) and petitioners in the case at bar did not constitute "purchases" within the meaning of the Agricultural Act of 1949, did the Court of Appeals for the Seventh Circuit err in specifically rejecting the plain meaning under the law of sales of the word "purchase" and substituting therefor an undefined standard, which it calls a "normal meaning"?

STATUTES INVOLVED

The statutes involved are the Agricultural Act of 1949, 63 Stat. 1051 (1949), 7 U.S.C. §§ 1421-1450, and the Commodity Credit Corporation Charter Act, 62 Stat. 1070 (1948), 15 U.S.C. §§ 714-714o. Relevant portions of these statutes are printed in Appendix A, *infra*, pp. 21-7.

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1. "App." refers to Petitioners' Appendix in the Court of Appeals, nine copies of which have been filed with this Petition.

STATEMENT

Five years before the events here in question Congress enacted the Agricultural Act of 1949 (herein called the "Act"), which imposed on the Secretary of Agriculture the duty to provide "price support" for milk, butterfat, and the products of milk and butterfat at a level not less than 75% nor more than 90% of parity, and directed him to set that level at the beginning of each marketing year and to maintain the announced level throughout that year. Because milk is so highly perishable, the Secretary was instructed to provide that support "through loans on, or purchases of, [not milk but] the products of milk and butterfat," *e.g.*, cheese and butter. Such purchases may be made, the Act provides, through CCC.[2] Apart from these specific requirements of the Act itself, "the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary . . ." and the determinations so made "shall be final and conclusive" (App. A, *infra*, pp. 21, 23-4).

Pursuant to the Act the Secretary designated the twelve-month period April 1 through March 31 as the marketing year, and thereafter announced the level of price support several weeks in advance of each marketing year. The price did not change appreciably in the first four years of the program because the support level for milk was set and

2. CCC is a federal corporation established as an agency and instrumentality of the United States within the Department of Agriculture, and its Board of Directors is subject to the general supervision of the Secretary of Agriculture; under its charter CCC has broad power to support the prices of agricultural commodities by means of "loans, purchases, payments, and other operations" (App. A, *infra*, pp. 25), but the Solicitor of the Department of Agriculture has construed the Act as limiting this authority, when applied to dairy prices, to the methods specified in the Act, *i.e.*, loans and purchases (App. 828-37, see also 846-51), and this interpretation is not in dispute here.

remained at the maximum statutory level, 90% of parity. CCC purchased and stockpiled large quantities of milk products between 1950 and 1953.

Congress gave the Secretary the power to minimize the net cost of CCC's purchases by providing that CCC "may sell any farm commodity owned or controlled by it at any price not prohibited by [the Act] . . ." (App. A, *infra*, p. 21). The Secretary has interpreted the Act to mean that CCC can sell at any price that will not interfere with the support price in effect at the time of the sale and accordingly CCC has followed the practice of selling its milk product holdings at prices slightly higher than the current support price (App. 1021; 236-7, 242-3, 245-8, *e.g.*, 636-43). In this manner large quantities of dairy products bought from the industry under the price support program have been sold back to the industry in time of shortage or rising prices. Still larger amounts have been sold in non-commercial channels or were given away for charitable purposes (App. 236-41; App. A, *infra*, p. 23).

Stockpiling in the first three years of the program had been gradual and manageable, but due to a combination of unforeseen circumstances unprecedented expansion of these stockpiles in the marketing year 1953-54 threatened serious harm to the economy (App. 249-50).

At the 1953-54 support price the commercial market fell far short of absorbing the plenteous supply of milk and butterfat produced during the 1953-54 marketing year. Consequently manufacturers of dairy products multiplied their sales to CCC. For example, in the first ten months under the 1953-54 program, CCC purchased 241,000,000 pounds of cheese, whereas in the entire preceding four years it had purchased only 211,000,000 pounds (App. 649). The entire industry was aware that a downward

change in the support program for the coming year was inevitable.

On February 15, 1954, the Secretary, acting after exhaustive economic and legal study of the problem, announced that he would reduce the support level from 90% to 75% of parity effective April 1, 1954. The corresponding prices that CCC would pay for cheese and butter in the coming year were announced three days later: beginning April 1, 1954, the CCC purchase price for cheese would be dropped $4\frac{3}{4}$ cents a pound, for butter, $8\frac{1}{4}$ cents a pound (App. 1031).

The Secretary's announcement had an immediate impact on petitioners, members of the dairy industry, who, acting individually, made plans which involved two steps: (a) reducing the prices paid cheese-makers for the cheese they would purchase in the latter part of the 1953-54 marketing year to a level consistent with the lower support prices which would become effective on April 1, 1954, and (b) selling as much of their higher cost cheese as possible to CCC under the existing and admittedly lawful programs before the April 1 price drop.

The Secretary, knowing that the economic situation would inevitably result in the creation of such plans, acted to bolster up the price support program and to reduce the expense of its administration. His objectives were twofold: (1) to make it possible for all cheese and butter produced before April 1 to be sold to CCC at the 1953-54 price, and (2) "to maximize the consumption in commercial outlets and to minimize the cost of the program" by encouraging commercial repurchase of the products in the 1954-55 marketing year (App. 246-8). In addition to amending existing procedures to implement his plans, there was

issued on March 9 an announcement called Da-112.[3] It was pursuant to announcement Da-112 that the transactions here in dispute took place.

Under Da-112, holders of cheese and butter were invited to submit offers to sell their holdings to CCC. The offers had to be submitted in time for acceptance by CCC prior to the close of business on March 31, 1954, the end of the 1953-54 marketing year. The offers had to state the quantities offered, their grade, the number and description of the containers and the locations at which the products would be held for CCC. With reference to delivery and transfer of title, Da-112 provided as follows in respect of cheese:

> "Cheese offered under this announcement must be in existence, dated, and owned or under consignment to offerer not later than March 31, 1954. Delivery to CCC and transfer of title shall be effected at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later, subject to its meeting the quality requirements set forth herein, as later evidenced by certificates issued by USDA which may be dated after March 31, but not later than April 30, 1954." (App. 668, paragraph 9)[4]

Unlike the standing regulations, under which sales to CCC and repurchases from CCC were covered by two separate contracts, Da-112 required those offering products to CCC in March to agree in the same contract to buy back

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3. The existing procedures were pursuant to announcements Da-99 (relating to CCC purchases of butter) and Da-100 (relating to CCC purchases of cheese) and Da-107 (relating to CCC's standing offer to sell milk products at prices higher than the current support price). The full texts of these announcements appear in the Appendix: Da-99 at pp. 616-25; Da-100 at pp. 626-34; Da-107 at pp. 635-43; Da-112 at pp. 662-71; and the March 9 amendments to Da-99 and Da-100 at pp. 659-61.

4. Title to butter passed to CCC upon acceptance by CCC of the offer, inasmuch as butter was required to have been graded prior to being offered.

the same product in April. These repurchase provisions constitute the only thing that is unique in Da-112.[5]

Relying upon Da-112 and in accordance with its provisions, petitioners offered large quantities of cheese and butter to CCC at the 1953-54 support prices and at the same time offered to repurchase them from CCC after the expiration of the 1953-54 marketing year. At no little expense to themselves, they complied strictly with every provision of that announcement. Their commodities met the required specifications, were packaged as directed, were submitted to Government inspection as required, and were inspected and graded in accordance with the Department regulations. Thereafter they were retained in storage for the specified period and were not returned to the commercial market before April 1. Only after complete performance on their part did petitioners receive the sums of money which the Department of Justice here seeks to recover (App. 1042; 189, 466, 474-5, 495, 514, 528-31).

In electing to accept the invitation of CCC to enter into these contracts under Da-112, petitioners passed up the opportunity of pursuing the plans they had formulated prior to the promulgation of Da-112 (App. 464-6, 520, 549).

On May 8, 1956, the Department of Justice demanded of petitioners (and over one hundred other companies which had engaged in Da-112 transactions) that they repay to CCC the sums paid to each by CCC for the asserted reason that the Da-112 transactions exceeded the Secretary's statutory authority. The Department of Justice then began to sue selected participants in the Da-112 transactions for

5. Exs. 65-67 (App. 863-79, 951-84) are examples of typical transactions under Da-112, and under the combined use of Da-100 and Da-107; it can be seen that the same result is obtained by using Da-100 and Da-107 as by using Da-112 alone, *i.e.*, Da-112 was simply a "streamlining" of the established procedures (App. 265, 272, 580).

recovery of the money paid under Da-112,[6] and petitioners filed their actions, pursuant to 28 U.S.C. § 2201 and 15 U.S.C. § 714(b), seeking declaratory judgments as to the validity of the Da-112 transactions.

At the trial, three officials of the Department of Agriculture took the stand as witnesses in behalf of petitioners. The Department and CCC have steadfastly maintained that the Da-112 transactions were authorized and valid, despite attacks upon the procedure by a congressional committee and by the Department of Justice (App. 368; 216, 327, 431).

The District Court held that the Secretary of Agriculture acted illegally in carrying out the provisions of Da-112 because: (1) the transactions did not constitute "purchases" within the meaning of the Act because "possession and control [and] . . . the right such as a buyer and owner under a sale and purchase contract normally has . . ." never effectively belonged to CCC, and (2) "[t]he basic theory of the 'purchase' method is removal from the market of goods which cannot be sold in the commercial market at CCC's

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6. United States v. Swift & Co., 152 F. Supp. 738 (D. Md. 1957), *aff'd*, 257 F.2d 787 (4th Cir.), *cert. denied*, 358 U.S. 837 (1958). United States v. H. J. Heinz Co., consolidated with the instant case, was originally filed in the District Court for the Eastern District of Pennsylvania, and was transferred to the Western District of Wisconsin pursuant to 28 U.S.C. § 1404(a) (App. 98); United States v. Kraft Foods Co., seeking repayment of $293,385.06, was originally filed in the District Court for the Eastern District of Pennsylvania but has since been dismissed by stipulation upon agreement between the parties that the decision in the instant case will be considered determinative. A declaratory judgment suit similar to the instant case has proceeded parallel to these cases, and was decided on the basis of the *Swift* decision: Land O'Lakes Creameries, Inc. v. Commodity Credit Corp., ____ F. Supp. ____ (D. Minn.), *aff'd*, 265 F.2d 163 (8th Cir. 1959). Petitioners are informed that the Department of Justice has also filed numerous other cases which are now pending in District Courts throughout the country awaiting final determination in this proceeding.

purchase price, and there was no such removal in these transactions." (164 F. Supp. at 182; App. 1012-3) The Court ruled that petitioners must return the money received under the Da-112 transactions with interest from May 8, 1956, the date repayment was demanded (164 F. Supp. at 183-84; App. 1012-3). Separate judgments were entered by the Court in favor of CCC against petitioners for sums which totaled $1,174,543.47 (App. 1046-52).

The Court of Appeals, while reversing and remanding insofar as ante-judgment interest was allowed, affirmed the judgments of the District Court in respect of the merits, holding that the word "purchases" should be given its "*normal*" meaning and not its "*legal*" meaning.

REASONS FOR GRANTING THE WRIT

1. This case presents a question that is basic in the administration of the Act and that is fundamental in the Government's price support program for dairy products, and should, therefore, receive the consideration of this Court.

The Secretary of Agriculture is charged with the responsibility of administering the Agricultural Act of 1949. In directing the support of milk and butterfat prices and in confining the means of accomplishing it to purchases of or loans on the *products* of milk and butterfat, Congress requires the Secretary to achieve support of dairy prices through transactions with members of the dairy products industry. Through no effort or desire on its own part, the dairy products industry has been placed in the position of being a vital and important instrument in accomplishing the price support program. But no matter how desirous they may be of cooperating with the Secretary, the members of the dairy industry can hardly be expected to run the risk of engaging in future transactions which appear

both to them and to the Secretary to be clearly authorized by the plain language of the applicable statute when such transactions may be set aside years later because the law under which they took place is given an interpretation that does not conform to generally recognized legal standards but, instead, is judged by a standard of "normalcy" which is undefinable and about which neither they nor the Secretary could have known.

The Department of Justice has attempted to create the impression that the transactions in dispute were novel, were a mistake with unfortunate results for petitioners, and that similar transactions will not occur again. The Da-112 transactions were novel only in that the same set of economic circumstances had not arisen before, so that the specific program initiated by the Department of Agriculture was, of course, without precedent on "all fours". However, the "purchase method" of price support was not only not novel but for years has been the basis for programs under which the petitioners and CCC have carried on transactions. This Court should recognize what both the Department of Agriculture and petitioners and other members of the dairy products industry know—there is no reason to believe that the same or similar circumstances that gave rise to Da-112 cannot or will not occur again.

Even the Court of Appeals recognized the importance of the issues in these cases and said (with specific reference to the *Swift* case):

> ". . . the case involved an important segment of the government price control program for agricultural products, pertaining to the economic life of the nation, and also a substantial monetary claim of CCC . . ." (266 F.2d at 263)

2. Petitioners are caught in a crossfire between two

departments of the Government. The Secretary and Department of Agriculture realize this and recognize the importance of the question presented. They know that the industry would not have abandoned its own plans and changed its position irrevocably if it had not, through its long course of dealing with CCC and the Department, acquired that confidence without which a change of position would not have been made.

The Court of Appeals errs in stating that "CCC insists" the Da-112 transactions were not "purchases", and that "CCC points out" arguments in support of that position. These contentions in the courts below were made by the Department of Justice appearing of record on behalf of CCC in court, while CCC and the Department of Agriculture have consistently asserted the legality of the Da-112 program and supplied three of the seven witnesses who testified at the trial in support of petitioners.

Petitioners have never contended that the Government is estopped by the actions of the Department of Agriculture, but petitioners do believe that their good faith reliance upon Da-112 which led them to abandon their plans to sell to CCC under its existing and unchallenged procedures establishes a set of circumstances which presents a serious issue of "elementary fairness" that should make for a thorough consideration of the legal question presented to this Court. *Cf. Moser v. United States*, 341 U.S. 41, 47 (1951).

In order to assist this Court in determining the importance of the legal issues presented, the petitioners in the *Swift* case (*supra* note 6, at 8) suggested in their Petition that the Solicitor General state the views of the Secretary of Agriculture (Petition in No. 270, October Term, 1958, p. 12). This suggestion was ignored by the Government

(See Reply Brief in Nos. 270 and 271, October Term, 1958, p. 3).

Since the present petitioners would expect a suggestion like that in the *Swift* Petition to receive the same treatment by the Government, and since the question presented on the merits is of major importance to the administration of price support legislation, petitioners respectfully suggest that this Court request the Solicitor General to submit a memorandum from the Department of Agriculture, setting forth its views on the matters raised by this Petition. *Cf.* Supplemental Memorandum for the United States, in *United States v. Radio Corporation of America*, No. 54, October Term, 1958.

3. The Court of Appeals did not afford petitioners the independent review to which they were entitled. In clear conflict with numerous decisions of this Court, the Court of Appeals attributed unwarranted significance to the *Swift* decision, *supra*, because this Court had denied certiorari to review that decision.

The Court of Appeals paid lip service to the settled maxim that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case". *United States v. Carver*, 260 U.S. 482, 490 (1923). It stated the proposition that such denial "simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court". *Agoston v. Pennsylvania*, 340 U.S. 844 (1950) (separate memorandum). But the court fell into error and demonstrated its failure to review independently the decision of the lower court when it continued as follows:

> ". . . our attention has been called to no language used by the Court impelling us to the conclusion that the members of the Court who did not vote for certiorari

> in the Swift case were indifferent to the opinion or the result in the Court of Appeals. . . . [T]he lack of at least four votes for granting certiorari cannot realistically be considered meaningless to federal courts who are asked to follow the Court of Appeals decision in Swift as a correct interpretation of the law. In view of the nature of the case, the fact that some justices (which could be as many as six or more) did not vote for certiorari is at least an indication that they either did not disapprove, or did not doubt, the correctness of the ruling below.
>
> "We hold . . . ." (266 F.2d at 263; App. B, *infra*, p. 43)

The court's view of the significance of the denial of certiorari is directly in conflict with statements by this Court and individual Justices.[7] Under the circumstances, petitioners have been denied the independent judgment of the Court of Appeals. That court went beyond mere reliance upon the decision of the Court of Appeals for the Fourth Circuit in the *Swift* case. Its entire approach to the merits of this

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7. Sheppard v. Ohio, 352 U.S. 910, 911 (1956) (separate memorandum); Rosenberg v. United States, 344 U.S. 889 (1952) (separate memorandum; "Misconception regarding the meaning of such a denial persists despite repeated attempts at explanation. It means, and all that it means is, that there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari."); Agoston v. Pennsylvania, *supra;* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950) (separate opinion); Atlantic Coast Line R.R. v. Powe, 283 U.S. 401, 403 (1931); United States v. Carver, *supra;* Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916). *Cf.* Brown v. Allen, 344 U.S. 443, 492, 543 (1953) (concurring opinion; "I agree that, as *stare decisis*, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case."); Wade v. Mayo, 334 U.S. 672, 680 (1948); Sunal v. Large, 332 U.S. 174, 181 (1947); House v. Mayo, 324 U.S. 42, 48 (1945).

case was misguided because of the significance it attributed to the denial of certiorari in that case.

Defendants' presentation in the *Swift* case was fundamentally different from that of petitioners in the case at bar. There defendants apparently believed it unnecessary to prove and press upon the courts the fact that the Da-112 transactions were purchases in the plain legal sense, but were satisfied to rely upon the sufficiency of the fact that the transactions had the *economic effect* of "purchases." Throughout the trial and appeal of the case at bar, petitioners have attempted to obtain an answer to the only real question raised by the transactions under Da-112—whether the sale of dairy products to CCC under Da-112 constituted "purchases" by CCC, as authorized by Congress.

By following the unreviewed decision of the Fourth Circuit in the *Swift* case, the Court of Appeals for the Seventh Circuit viewed the question not as it emerged from the instant record, but as it was viewed by the other court. Petitioners are before this Court to obtain a review which will result in a definitive determination of the plain legal meaning of the word "purchases" as used in the Act and the CCC Charter Act.

4. The decision below was incorrect.

The Court of Appeals erred in rejecting the plain meaning of the word "purchases" under the law of sales in determining whether or not the Da-112 transactions between petitioners and CCC constituted purchases of dairy products by CCC within the meaning of the Act.

If the transactions were purchases, they were within the Secretary's statutory powers; if they were not purchases, they were unauthorized. The basic question on the merits is that simple.

(a) Unless it would lead to an absurd result or one plainly at variance with the purpose of the legislation as a whole, a court must give the words of a statute their plain meaning. *Union Pacific R.R. v. Hall*, 91 U.S. 343, 347 (1875); *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940). Where, as in the present instance, the words are legal terms, they must be given their legal significance. 82 C.J.S. *Statutes* § 330, p. 654.

(b) The challenged transactions should have been upheld as constituting "purchases" since they fulfilled every requirement of the law of sales, as stated in the Uniform Sales Act, which is declaratory of the common law: "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." In Da-112 transactions there was agreement between petitioners and CCC that petitioners would transfer their property in identifiable dairy products to CCC at specified times and at specified prices (paragraphs 8, 9, App. 667-9). With respect to cheese, for instance, paragraph 9 of Da-112 provided that it had to "be in existence, dated, and owned or under consignment to offerer not later than March 31, 1954," and that transfer of title would be effected "at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later"; paragraph 8 of Da-112 stated the prices that would be paid by CCC.

Under the law a sale is a contract whose terms are governed by the intention of the parties. When a sale contract unambiguously expresses an intention that title shall pass at a stated time, as the Da-112 contracts did, title vests at the stated instant in the buyer, and by the inexorable operation of the law there is a sale. *Briggs v. United States*, 143 U.S. 346, 354 (1892); *Commonwealth Title Ins. & Trust Co. v. Gregson*, 303 Ill. 458, 135 N.E. 745 (1922).

This result can be avoided in this case only by asserting that the stated intention was not genuine, was somehow a sham or a fiction contrived to hide the real intention. *Cf. United States v. Steiner*, 152 F.2d 484 (7th Cir. 1945). But such speculation is obviated by the stipulated fact that the parties to these contracts acted in good faith throughout (App. 1042-43; 192). And the entire record confirms that good faith.

The District Court evaded discussion of the law of sales. In its opinion no weight was given to the good faith intention of the parties to transfer title—and instead there was substituted for the time-tested instrument of the law an undefined concept of a "normal" sale. The Court of Appeals affirmed that approach. What is a "normal" sale? By what standards can normality be determined?

If sales law actually conformed to so naive a norm as the lower courts have applied in judging Da-112 transactions, it would long ago have thwarted the development of our complex economy in which repurchase options and contracts, instantaneous transferrals of title, binding contracts concerning future goods, conditions precedent and subsequent, conditional sales, sales with the privilege of return, and an infinite variety of "paper transactions" that transfer title are everyday affairs. A buyer does not have full rights of ownership unless he has the right to make contracts concerning what he owns, and the fact that he ties his own hands by entering into a re-sale contract does not derogate at all from the fact that he has and is exercising rights as a buyer and owner. *Cf. Collins v. Fleming*, 159 F.2d 426 (Emer. Ct. App. 1947); *Reed & Fibre Products Corp. v. Rosenthal*, 153 Md. 501, 138 Atl. 665, 669-70, 672 (1927).

Since the disputed transactions were "purchases," they were within the statutory powers of the Secretary of Agriculture. Any attack upon the nature of the transactions is an attack upon the Secretary's exercise of discretion which is not permissible under the Act.[8] This is the complete answer to every contention made by the Department of Justice with respect to the Da-112 transactions.

(c) If it was proper for the Court of Appeals to go beyond the plain legal meaning of the term "purchases" in construing the Act, which petitioners contend it was not, the court should have given controlling weight to the determination of the Secretary of Agriculture that the transactions under Da-112 were "purchases".

Both by law and by the terms of the Act itself, a presumption of validity attached to the Secretary's determination that the Da-112 transactions were "purchases" within the meaning of the Act. When the courts go beyond the plain legal meaning of a disputed statutory term, as the court did in this case, the weight that attaches to that presumption is particularly great.[9] Yet the Secretary's determination was given no weight whatsoever by the Court of Appeals.

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8. "Determinations made by the Secretary under this Act shall be final and conclusive . . . ." App. A, *infra*, p. 23.

9. App. A, *infra*, pp. 21, 23; Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153-4 (1946); Billings v. Truesdell, 321 U.S. 542, 552-3 (1944); Gray v. Powell, 314 U.S. 402, 412-3 (1941); United States v. American Trucking Ass'ns, 310 U.S. 534, 549 (1940); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933); United States v. Jackson, 280 U.S. 183, 193 (1930); United States v. Alabama Great So. R.R., 142 U.S. 615, 621 (1892); United States v. Moore, 95 U.S. 760, 763 (1877).

5. In contending that the Secretary exceeded his authority, the Department of Justice has, among other things, argued that the Secretary made "payments" to petitioners which constituted a subsidy, that the commodities in question were not removed from the commercial market, that the transactions were akin to "wash sales", and that the contracts were not binding upon the petitioners. Such arguments have obscured the issue, and petitioners believe that they have no place in the case at bar because a decision that the Da-112 transactions constituted purchases would provide a complete answer to the only real issue. Nevertheless, anticipating that the same arguments may be made to this Court, petitioners wish to inform this Court briefly in respect of each such contention.

(a) By constantly referring to the funds received by petitioners as "payments" the Department of Justice has created the erroneous impression that they were payments in the economic sense, and not funds expended by the Secretary in the making of purchases to support prices. A subsidy is a payment directly to the producer of a supported product which augments his income but allows the market price to find its own level; a price support program embodying the "purchase method" removes the product from the commercial market and thereby directly affects market price. This removal requires no particular physical manifestation; it is effective if the commodities are not for sale in the commercial market. The uncontradicted evidence in the record shows that the commodities involved in the Da-112 transactions were taken out of regular business

channels and kept safely in place for CCC in the manner required by the contracts (App. 466, 530-1).

(b) The disputed transactions are readily distinguishable from the payment method known as "wash sale," discussed by the Department of Agriculture in a report to the House Committee on Agriculture in January 1953, a time when the Secretary had no reason to suspect that the Da-112 transactions would be held to be invalid (H.R. Doc. No. 57, 84th Cong., 1st Sess., 1955; App. 787). In a "wash sale," there is simultaneous purchase by CCC and sale back at a lower price, much the same as direct payments on production. In the instant transactions, the dairy products were removed from the commercial market from the date of the contracts through March 31, 1954, the end of the marketing year. This removal was intended to and did bolster the market price level, whereas wash sales or direct subsidy payments would not have accomplished a removal of cheese and butter from the commercial market and therefore could not have supported their prices.

(c) The Department of Justice has maintained that the provision in Da-112 that failure to hold the dairy products in place for CCC until at least the end of the marketing year would "render the contract void" (App. 669) was inserted in Da-112 as an "escape hatch" through which sellers could avoid their contractual obligations. Petitioners have clearly disproved this assumption; indeed, the CCC attorney who drafted the provision in question testified that it was inserted for the benefit of the CCC "to emphasize the importance of the requirement that the commodity had to be held at the place where [CCC] inspected it until the sale back was completed in April" (App. 372).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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